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THE BASIS OF RATE-MAKING AS A POLICY.

The Commerce Court held its first regular term on April 3d, 1911, when the first cases before it began to be heard and argued. In advance sheets of 188 Federal Reporter, dated September 7th, 1911, we find the first reported cases, which sheets contain reports of other cases.

There are four lengthy opinions, and the conclusions reached in them govern other cases. In one case only does the opinion seem to meet with unanimous approval; in another the conclusion is unanimous, and there is special concurrence by one judge; in another Judge Mack dissents, and in another Judge Archbald writes a dissenting opinion in which Judge Mack concurs.

It is this last case of which we desire to speak. See Hooker v. Interstate Commerce Com., 188 Fed. 242.

The facts in this case show that various petitioners, firms, partnerships and corporations, engaged respectively in mercantile and manufacturing pursuits, doing business in the county in which is Cincinnati, selling annually merchandise of several hundred thousand dollars to purchasers located at Chattanooga, filed a bill of complaint to annul an order of the Interstate Commerce Commission fixing rates to Chattanooga as being extortionately high, so far as the Cincinnati, New Orleans and Texas Pacific Railroad, whose termini are in Cincinnati and Chattanooga, was concerned.

The commission filed a report in justification of the rates that were complained of, in which this language occurs: "If it is our duty to take this railroad by itself and to determine the reasonableness of these rates by reference to cost of construction, cost of maintenance and profit upon the investment, we think the complainants have established their case and that these rates ought fairly to be reduced."

The Commerce Court said: "It necessarily follows that its order ought to have followed its findings, unless the reasons stated by the Commission for not doing so are valid." It was said also that this order, if not justified by such reasons as the Commission gave, would be violative of the Fifth Amendment, prohibiting the taking of property without due process of law.

Now what were those reasons in so far as they were sustained by the Commerce Court?

They are summarized as follows: "These rates should be fixed not only with reference to the financial results and financial necessities of the Cincinnati, New Orleans and Texas Pacific Company, but also with reference to other companies whose rates are necessarily affected by these; otherwise stated, the Commission should establish rates which are just and reasonable for the section in which they prevail. If a particular company is so situated that it can make a handsome profit under such rates, that is the good fortune of that company, just as it would be the misfortune of some other company, if it could not show as favorable earnings."

We think that this is scarcely stating the situation fairly. The petitioners claimed there were "extortionate" profits, and the Commission said the fortunate road was making such profits. "Handsome" and "extortionate" do not seem necessarily synonymous when descriptive of profits, and the latter kind were up for consideration by the court.

The Commerce Court, however, seems to concede there is a constitutional question involved in the fixing of these rates. It recites that "the Commission has always refused in the consideration of the reason-

ableness of a rate or rates to consider only the particular carrier making the same by itself, but on the contrary has always considered the rates in a particular territory or the rates of other carriers, to be affected by the change of the particular rate or rates in question; and we think it fair to say that, so far as the Commission is concerned, there has been a uniform policy (public policy, if you please), because the Commission represents the United States in so far as it acts within the scope of its delegated powers."

We must confess that as yet we see nothing whatever that begins to touch the question, whether the Fifth Amendment is violated or not. No uniform policy by a creature of Congress can possibly be valid unless the Fifth Amendment is not operative at all in the premises. The Commission in violating that amendment would not be acting "within the scope of its delegated powers" by attempting to create a policy that amendment denounces.

Further, the Commerce Court says: "This court may take judicial knowledge of the fact that the interstate rates prescribed for the transportation of freight by common carrier must necessarily be more or less interdependent, or at least so related to each other that the rate-making power will not, simply because it has the power, fix a rate upon a single line of railroad, which will necessarily disorganize established and reasonable rates on other railroads in the same territory."

How this touches the question of the constitutional right of a shipper to require of a particular common carrier to receive and carry his goods for reasonable compensation for the service performed we are at a loss to see.

The ultimate authority of the Commission is to make rules for this. But the language just quoted implies it may depart from this. The carrier-right is to have any rate nullified that denies fair compensation.

Could any carrier who would be unable to carry freight from Cincinnati to Chattanooga be denied a lawful rate, because the Cincinnati, New Orleans and Texas Pacific Company could make a profit at an even lower rate? We do not think the Commission would so rule Is not the shipper's right as broad as the carriers? Does not the rule work both ways?

Judge Archbald, speaking for himself and Judge Mack, says: "If the Cincinnati Southern was the only line from Cincinnati to Chattanooga, the rate, of course, so far as it was not a joint rate, would be fixed with reference to that road alone. * * * * So, also, if this road were first in the field, and other roads had come in after it was built, it certainly would not be contended that with the introduction of new and additional facilities, the lower rates prevailing on the more favored line could be raised to meet the necessities of others not so well placed. * * * But what difference does it make whether the road which can afford the best rate is the first or the last to be built? The shipper is entitled to the benefit of any advance in transportation facilities that may be made, and is not to be tied down to the unprogressive and outdistanced past."

The fact is that another road one-third greater in distance between the points in question was deemed by the Commission to be a factor in the rate situation and for this, rates were practically based on 450 miles of road, instead of 336. In other words, the shipper pays on 114 useless miles of railroad because of the interdependence spoken of. But let a shippers' rate take one mile out of a railroad mileage as a basis for a carrier's reasonable compensation and the cry of confiscation reverberates over the world..

Would it be competent to answer such a claim in the manner that the shippers were answered in this case, if the carrier were claiming rates were confiscatory?

Manufacturing plants face the advent of new inventions which cheapen their processes, and in time relegate their machinery to the scrap heap.

Is the servant of the people, a public utility enjoying privileges that are denied to purely private enterprise, to be exempt from perils that come to the business of which it is a mere auxiliary? In a word, may a commission establish a trust in rates in favor of agencies, which are endowed with life upon an implied contract to give fair service for fair compensation?

NOTES OF IMPORTANT DECISIONS

INSURANCE—WHEN INSURABLE INTEREST IS BY REASON OF INFERENCE. A QUESTION OF FACT FOR THE JURY.—The case of Kopetouske v. Mutual Life Ins. Co. of N. Y., 187 Fed. 499, decided by Sixth Circuit Court of Appeals, is of interest as indicating the sufficiency of evidence to draw to the jury, as a question of fact, insurable interest in the life of another.

Rosenthal, the insured, lived in the family of Berger, his nephew, and assigned policies of insurance to his nephew several years before his death. The two ran a business ostensibly belonging to the nephew, it being first conducted in Chickamauga and afterwards in Chattanooga down to the time of Rosenthal's death.

The facts are thus summarized by the court: "The record fails to disclose that either of them was connected in any other business than that of the store. Nevertheless, Rosenthal's business was such as to lead to the employment of counsel some eight or nine years before his death, towards whom he continuously thereafter maintained the relation of client. Whatever their business relation was, they were colaborers in the same enterprise, the conduct of which apparently furnished a livelihood for both. To some degree each was dependent on the other in its management. They lived all the while under the same roof as members of the same domestic circle, far remote, in so far as the record shows, from other relatives, between whom and them it does not appear that any communication ever passed. Each enjoyed, in business and in the family circle, whatever of comfort and protection the other afforded. They were tied together by blood as well as by their domestic and business relations, both of which had been uninterrupted and gave evidence of permanency. The inference would not be farfetched that their remoteness from others of the same blood bound them in closer union. Rosenthal had no other home. He gave no evidence of abandoning it, and to do so was perhaps to go among strangers. There is no suggestion of discord between them, or of other than such affection as usually exists between persons related and associated as they were. Putting that construction upon the evidence which a court must give it on a motion for a directed verdict, the assignment of the policies is in itself an indication of strong affection and of an intended continuance of existing relations (Lord v. Dall, 12 Mass. 115, 118, 7 Am. Dec. 38; Bliss, Life Ins. § 21)—an affection giving rise to presumptions or inferences different from those which would arise had no such relationship existed. 22 Am. & Eng. Ency. Law, 1278. There is nothing to indicate a contemplated discontinuance of their relations. That Rosenthal was a member of Berger's family rebuts the idea that he was abiding there temporarily as a stranger. 19 Cyc. 452; Tyson v. Reynolds, 52 Iowa, 431, 3 N. W. 69. At his death Rosenthal was but fifty-one years of age. When the policies were assigned he was in the prime, and, for aught that appears, the vigor of life. If permitted to live his allotted time as determined by the mortality tables, he might have rendered much valuable service in the business which engaged the attention of both, and might have contributed to the support and maintenance of Berger, in case of the latter's disability, or of his family, in case of his death. The plaintiffs were further entitled to the presumption that the policies were originally obtained and subsequently assigned honestly and in good faith (Kerr, Ins. p. 780), and, in the absence of proof to the contrary, that Rosenthal paid the premiums. Crosswel v. Conn. Indemnity Ass'n., 51 S. C. 103, 28 S. E. 200."

The Circuit Court of Appeals in holding that this case should have been allowed to go to the jury is seen to take into considerations a variety of circumstances. By itself the degree of relationship in blood would not have been sufficient, but yet it was to be taken as one of the circumstances, and remoteness in distance from the sisters and brothers of insured another—all the circumstances in the situation of the parties to be considered by a jury as to whether or not the nephew's "temporal affairs, his just hopes and well-grounded expectations of support, of advantage in life, would be impaired by Rosenthal's death."

This leaves, it seems to us, the principle of the existence *vel non* of insurable interest in another's life about as latitudinous in application, as one well might hope a principle of law to be.

REFORM IN PROCEDURE—A PROPHECY AND A FULFILLMENT.

Last January, Hon. Edgar H. Farrar, of New Orleans, ex-president of the American Bar Association, sent us a letter on the subject of reform in procedure which we wish here to publish. It shows the wisdom and foresight of Mr. Farrar to be quite extraordinary. Mr. Farrar wrote as follows, under date of January 11, 1911:

"Yours of January 4th, in regard to the campaign undertaken by you for some definite conservative reform in procedure along the lines suggested in the recent message of President Taft, is to hand.

"I am in thorough sympathy with this movement, but I must say the subject is one which has pursued lawyers, litigants and judges since the foundation of law courts, and is one of extreme difficulty. My own view of this matter always has been that the reform must commence in the federal procedure. If there were adopted by the Federal Government a code of procedure in the courts of the United States in all matters involving questions of law or questions of equity, the states would one by one slowly follow this reform. As the law stands now all proceedings on the law side of the federal court follow the statutes and proceedings used in the state where the court sits. This provision of law was evidently adopted as a concession to the local lawyers of each state. Proceedings in admiralty, of course, are the same throughout the United States, except as modified by the various rules of the various district courts in so far as they are permitted to modify the rules adopted by the supreme court. Proceedings in equity in the courts of the United States are in identically the same position as proceedings in admiralty. So far as proceedings in law and in equity in the courts of the United States are concerned, there is an unfortunate handicap in the fact that the constitution of the United States recognizes and enforces the distinction between law and equity and this distinction would possibly be a bar to many reforms. If necessary, I believe that the constitution should be amended so as to permit the adoption at least of the reform procedure which has proven so satisfactory in England.

Yours very truly,

EDGAR H. FARRAR."

Since this letter was received Congress has given the Supreme Court power to revise the equity rules of the federal courts, a committee of three supreme justices have been appointed and have been commissioned to make the revision; Justice Lurton has been to England and made a thorough study of the workings of the Judicature Act of that country; The American Bar Association at its meeting in August, 1911, through its committee on reform in procedure decided to direct its program for reform through this committee of the federal court for the reason, as stated by Judge Farrar, that a code prepared by the Supeme Court of the United States will have sufficient prestige and influence back of it to make it the ideal code for uniform adoption throughout the country.

In view of the article appearing in this issue on "Law and Equity in the Federal Courts," by Prof. Roscoe Pound, it does not appear that the objection as to the constitutionality of the proposed reforms is insuperable.

At any rate the path along which this very much desired reform must go, as clearly indicated by Judge Farrar is now very apparent to the profession and the opportunity is being eagerly grasped.

A. H. R.

LAW AND EQUITY IN THE FEDERAL COURTS—ABOLISHING THE DISTINCTION AND OTHER REFORMS.*

The Constitutionality of the Proposed Change.—The first question in any proposed reform in federal procedure with respect to the absolute separation of legal and equitable proceedings must be one of constitutionality. There are many *dicta* in the books to the effect that such a separation is required by provisions of the Constitution. It may be well to set forth these *dicta*.

"It is undoubtedly true," said Taney, C. J., "as contended for in the argument of the complainant, in regard to equitable rights, that the power of the courts of chancery of the United States, is, under the Constitution, to be regulated by the law of the English chancery; that is to say, the *distinction between law and equity* as recognized in the jurisprudence of England *is to be observed in the courts of the United States in administering the remedy* for an existing right. *The rule applied to the remedy and not the right.* * * * *It is the form*

*This article is an argument prepared by Prof. Pound at the request of the Committee of the American Bar Association to Prevent Delay and Unnecessary Cost in Litigation.

of remedy for which the Constitution provides."[1]

This *dictum* of Chief Justice Taney (at circuit) has been cited as meaning that the Constitution provides for a proceeding in chancery for all rights to which such proceedings were appropriate under the old English practice. But, properly apprehended, such is not its meaning. The learned Chief Justice saw, what many have pointed out since, that the distinction was one of remedy; that for certain situations our legal system provides a remedy by a command addressed to and enforced against the person, and that the Constitution expressly provides that the federal courts shall administer this type of remedy in appropriate cases. It does not provide, nor does the dictum above quoted say that it provides any *procedure* by which the type of remedy in question is to be sought or in which it is to be awarded.

A number of subsequent *dicta,* however, are put more sweepingly:

"The Constitution of the United States, in creating and defining the judicial power of the general government, establishes this distinction between law and equity; and a party who claims a legal title must proceed at law."[2]

Here, again, what is meant is that one whose claim is legal must have a legal remedy; not that this remedy must be sought in any particular *form* of proceeding. The former was all that the court had to decide.

Again it is said: "In the last mentioned case[3] the Chief Justice, in delivering the opinion of the court: says: 'The Constitution of the United States has recognized the distinction between law and equity, and it *must* be observed in the federal courts.' In Lousiana, where the civil law prevails, we have necessarily to adopt the law and equity by enacting a hybrid system. But in those states where the courts of the United States administer the common law, they *cannot* adopt these novel inventions, which propose to amalgamate law and equity by enacting a hybrid system of pleadings unsuited to the administration of either" (Italics in the original.)[4]

This protest against the attempt of the federal district court for Iowa to apply the Iowa code of civil procedure was well taken. Beyond that, the passage is only one of many oracular pronouncements to be found in the books, when the codes of procedure were new, which have been refuted by the event.

In another case it is said: "The only way in which the defendant could have effectively raised the question of his liability as a shareholder, arising from frauds committed by the bank or its officers before its suspension whereby he was induced to become a shareholder, was by a suit in equity against the bank and the receiver. Instead of pursuing that course, he sought by interposing an equitable defense to defeat this action at law brought by the receiver under the statute. *That cannot be done because under the Constitution of the United States the distinction between law and equity is recognized,* so that in actions at law in a Circuit Court of the United States equitable defences are not permitted."[5]

In still another decision the court said: "There is a fundamental distinction *growing out of the federal constitution and legislation between legal and equitable procedure.* The seventh amendment to the Constitution provides that in 'suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' And section 16 of the Judiciary Act of September 24, 1789, reproduced in section 723 of the Revised Statute, enacts that 'suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law.' These constitutional and statutory

(1) Meade v. Beale, Taney, 339, 361 (1850).
(2) Taney, C. J., in Bennett v. Butterworth, 11 How. 669, 674 (1850).
(3) Bennett v. Butterworth, supra.
(4) Grier, J., in McFaul v. Ramsey, 20 How. 523, 525 (1857).
(5) Harlan J., in Lantry v. Wallace, 182 U. S. 536, 550 (1900).

provisions control the procedure of the federal courts."[6]

Here the matter is put upon its true ground, namely, the seventh amendment and federal legislation, and it may well be that the preceding extract in reality proceeds upon the same idea.

We have, then, three matters to consider, when legal and equitable procedure in a federal court are before us: (1) the constitutional recognition of law and equity in the provision conferring jurisdiction upon the courts of the United States; (2) the seventh amendment; (3) federal legislation providing for distinct procedure at law and in equity. The first of these is the basis of some or even of all but the last of the judicial pronouncements above quoted. Yet if we go back to the fountain head of these statements in the original *dictum* of Taney, C. J., we see at once that he had in mind the *remedy not the form of procedure*, and hence that his remarks afford no ground for assuming that the words "at law and in equity" require a distinct procedure. Rather those words were meant to give to federal courts each of the two great classes of remedies of the Anglo-American legal system. Accordingly, many *dicta* have recognized that a *substantial not a formal or procedural* distinction is the one recognized. For instance, that is evidently what Curtis, J., had in mind when he spoke of "the *equity law* recognized by the Constitution and by Acts of Congress."[7]

So, also in the following: "The Constitution of the United States and the acts of Congress recognize and establish the *distinction between law and equity*. The *remedies* in the courts of the United States are at common law or in equity, not according to the practice of state courts, but according to the principles of common law and equity as distinguished and defined in that country from which we derive our knowledge of these principles."[8]

(6) Bradford, J., in Jones v. Mutual Fidelity Co., 123 Fed. 507, 517 (1903).

(7) Neves v. Scott, 13 How. 268, 272 (1851).

(8) Davis, J., in Thompson v. Railroad Companies, 6 Wall., 134, 137 (1867).

There remains one remark of an eminent judge sitting in a Circuit Court of Appeals: "But in the courts of the United States *the distinction between actions at law and suits in equity and between legal and equitable defences* is carefully preserved because it is clearly recognized in the Constitution and laws of the United States."[9]

It is submitted that this means that the distinction between the remedies and the substance of the defences is recognized by the Constitution and the distinction between the modes of procedure is established by the statutes.

In the requirement of the seventh amendment, that the right of trial by jury shall be preserved, we find a more serious matter.

That this is the true basis of separate procedure at law and in equity has been recognized by many judges.

Thus it is said: "The Constitution in its seventh amendment declares that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' In the federal courts this right cannot be dispensed with except by the assent of the parties entitled to it, *nor can it be impaired by any blending with a claim properly cognizable at law of a demand for equitable relief in aid of the legal action or during its pendency*. Such aid in the federal courts must be sought in separate proceedings, *to the end that the right to a trial by jury in the legal action may be preserved intact.*"[10]

This evidently does not mean that the learned justice thought such a blending might not be provided for, if it did not impair the right to jury trial of legal issues. No such blending was permissible under the existing practice, and the reason is

(9) Van Devanter, J., in Anglo-American Land Co. v. Lombard (C. C. A.), 132 Fed. 721, 731 (1904).

(10) Field, J., in Scott v. Neely, 140 U. S. 106, 109 (1890).

pointed out, namely to preserve the right to jury trial. If, therefore, that right can be preserved, such a blending of legal and equitable issues in one cause might be established by proper authority.

That this is so, the Supreme Court of the United States has made clear abundantly in passing upon legislation in territories where statutes had done this very thing. Thus it has been declared: "The question is whether this act of the territorial legislature in substance impairs the right of trial by jury. *The seventh amendment*, indeed, *does not attempt to regulate matters of pleading or practice, or to determine in what way issues shall be framed by which questions of fact are to be submitted to a jury. Its aim is not to preserve mere matters of form and procedure, but substance of right.* This requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself this prerogative. *So long as this substance of right is preserved, the procedure by which this result shall be reached is wholly within the discretion of the legislature, and the courts may not set aside any legislative provision in this respect because the form of action—the mere manner in which questions are submitted—is different from that which obtained at the common law.*"[11]

So, also, it has been said: "As in Oklahoma (then a territory) the distinction between actions at law and suits in equity is abolished—each action being called a civil action, whatever the nature of the relief asked * * * —we perceive no reason why the case may not proceed in the trial court under the pleadings as they have been framed, with the right of the defendant to a trial by jury of all issues which, according to the recognized distinctions between actions at common law and suits in equity, are determinable in that mode."[12]

(11) Brewer, J., in Walker v. Railroad, 165 U. S. 593, 596 (1896).

(12) Harlan, J., in Black v. Jackson, 177 U. S. 349, 364 (1899).

In that case the suit was in form one for a mandatory injunction. The court held that the seventh amendment did not require that the cause be brought anew as an action of ejectment, but that a jury trial of the legal issue as to possession would suffice.

This construction of the effect of the seventh amendment upon procedure at law and in equity, which must commend itself to every one's good sense, is borne out, moreover, by what the court, speaking through Mathews, J., said in *ex parte* Boyd,[13] "And the remaining question, therefore, becomes, not so much whether Congress may, by appropriate legislation transmute an equitable into a legal procedure, as whether it can in any wise change the rules of pleading and procedure as to courts, either of law or equity, in force in England at the time of the adoption of the Constitution, or *whether by the adoption of that instrument all progress in the modes of enforcing rights, both at law and in equity, was arrested and their forms forever fixed. To state the question is to answer it.*"

It would seem, therefore, that:

(1) The Constitution gives the courts both legal and equitable jurisdiction, that is the power to give both legal and equitable remedies, so that neither may be taken away by legislation.

(2) The Constitution preserves a right to a jury trial of legal issues triable only in an action at law under the common law, which cannot be taken away, though it may be waived by the party entitled.

(3) If the remedies and the right so secured are not taken away or impaired, the mere manner in which the remedy shall be sought and the issue to be tried shall be presented is subject to legislative control.

(4) Hence, if anything, legislation only requires the present complete and absolute separation of law and equity in federal procedure.

(13) 105 U. S. 647, 656 (1881).

How Far Rules of Court May Achieve the Desired Reforms.—The second question may well be, how far may rules of court achieve the desired reforms and how far must they be achieved by legislation? As has been seen, the Judiciary Act of 1789, chap. 20, sec. 16, recognized the *substantive* distinction. But sec. 19 of the same act recognized, or at least assumed, a procedural distinction. Section 21 of that Act and sec. 36 of the Act of May 8, 1792,[14] do the same. Since that time the distinction has been assumed in all subsequent legislation. Whether it is *required* thereby is not so clear. But the federal courts have said that it is so emphatically so many times that resort to legislation may be the better course. There is good precedent, however, for allowing amendment from law to equity and *vice versa,* without express legislation, in the decision of Chief Justice Doe of New Hampshire in Metcalf v. Gilmore.[15] In that cause, the court held that the fact that the Statute of Jeofails allowed amendments at law and that amendments were always allowed in equity, couples with the union of legal and equitable powers in one court, was enough to justify such amendments. Doe, C. J., said: "Against an amendment based on the existing unity of jurisdiction it might be asserted that nothing can be done in court without a precedent, and that there is no precedent for such an amendment. But the unity of jurisdiction authorizes such an amendment as could have been made if the unity had been coeval with the common law. In a writ of entry on a mortgage it is found that the mortgage should be reformed. If law and equity had not been disjoined in England (as by the true principle of the common law they could not be) another suit with new process and new notice, for the reformation of the mortgage, would be no more necessary than a new suit to amend a town clerk's record or an officer's return, a reformation of which becomes necessary and is made during the trial. By fair implication the legislative act uniting the disjointed function prescribes whatever new proceedings are requisite for giving due effect to the union."

In some ways the federal courts are much better situated to allow this desirable practice without legislation than was the Supreme Court of New Hampshire. In the federal courts, the practice at law by statute conforms to the state practice, which almost everywhere allows amendment from law to equity or *vice versa.* The practice in equity, by statute, is subject to regulation by rules of court. With full legal and equitable jurisdiction in all the federal courts, it would seem that, unless the long line of *dicta* above quoted afford an insuperable obstacle, the power to make equity rules might well be invoked and obviate the interference of Congress. Moreover, there is good federal precedent for such amendment without even a federal equity rule.[16]

What Reforms are Desirable?—Thirdly, we must ask, what reforms in the relation of law and equity in federal procedure are desirable? It is submitted that three are desirable at once: (1) power of amendment from law to equity and *vice versa;* (2) power to allow equitable defences and equitable replications at law; (3) power to grant ancillary equitable relief in pending legal proceedings without requiring an independent suit with new process.

The first of these raises no questions other than those already discussed. Its desirability would seem beyond argument. It exists not only in the 27 code jurisdictions, but also in the more advanced common-law jurisdictions. As has been seen, in New Hampshire it exists by judicial decision as a corollary of the granting of legal and equitable jurisdiction to one set of courts. Noteworthy statutes giving the same power, where legal and equitable procedure are kept distinct, are: Massachu-

(14) 1 Stat. at Large, 276.
(15) 59 N. H. 417, 433.

(16) Schurmeyer v. Life Ins. Co., 171 Fed. 1.

setts, Revised Laws, Chap. 173, sec. 52; Illinois, Laws of 1907, page 435, sec. 40. In this respect practice in the federal courts is far behind that in the state courts.

The second proposed reform involves three items: (a) allowing equitable defenses at law; (b) allowing equitable cross-demands in legal proceedings, where, to make one's defense he must have affirmative equitable relief, such as reformation, cancellation or specific performance: (c) allowing equitable replications at law, as, for instance where a release under seal is set up as a defense and the plaintiff desires to avoid it on the ground that it was obtained by fraud. That this is not permitted in the federal courts, see Hill v. Northern Pac. R. Co.[17] All of these powers are possessed by the majority of our state courts and their desirability need not be argued. The sole difficulty lies in the necessity of carefully preserving the constitutional right to jury trial of legal issues. This has not proved a serious obstacle in the twenty-seven code jurisdictions, though the legislative solutions thereof have not always been happy.

Three classes of cases have arisen under codes and practice acts: (i)pure equitable defences, used defensively only. Here many jurisdictions submit the facts to a jury, as the party who interposes the defense at law may not well complain thereof. But, if the court itself passes on the facts on which such a defense is predicated and directs what legal effect shall be given to the facts so determined, according to what a court of equity would have done in a separate suit for that purpose, no constitutional right is impaired.[18] (ii) Cross-demands for equitable relief of an affirmative nature, which, if granted, will cut off or dispose of plaintiff's case, but if denied will leave his case yet to be tried on its purely legal issues or some of them. Here the latter only are triable to jury as of constitutional right. Hence the court may try the claim for equitable relief, and then, if any legal issues remain to be tried, a jury trial may be had.[19] (iii) In some cases a legal cross-demand has been set up in a suit in equity. Here the party who so sets it up and asks that it be adjudicated in the equity cause has been held to have waived a right to jury trial. Yet the other party may not choose to waive such right. Then the question obviously ought to depend upon whether, as may sometimes be done, this legal issue can be used defensively in equity under the chancery practice. If so, obviously no jury trial may be had; if not, the right must be preserved.[20]

Some of the codes have tried to formulate these rather obvious conclusions, to which the courts have come wherever legislation would allow them, by the use of general phrases, such as "actions for the recovery of money only," "legal issues," "equitable issues" and the like. Such formulas have made much difficulty, since questions have arisen as to how far they may have altered the pre-existing rights as to mode of trial.

On the whole, no better formula is to be found than that announced by Harlan, J., in Black v. Johnson,[21] that a party must have as of right "a trial by jury of all issues which, according to the recognized distinctions between actions at common law and suit in equity are determinable in that mode."

Still another difficulty may be suggested here, namely, the different mode of review in the federal courts of actions at law and suits in equity respectively. It may be asked what is to be done where an action at law involving equitable defences or an equitable replication must be reviewed—shall there be error as to the legal part and appeal as to the equitable part, which would produce great confusion? The question is not a new one. In many of the code states

(17) (C. C. A.) 113 Fed. 914.

(18) Marling v. Railroad Company, 67 Ia. 331.

(19) Fish v. Benson, 71 Cal. 428; Stono v. Weller, 128 N. Y. 655.

(20) Larkin v. Wilson, 28 Kan. 513; Davison v. Associates of the Jersey Co., 71 N. Y. 333.

(21) 177 U. S. 349, 364.

separate forms of review for law and equity were preserved till recently, and hence this very situation arose. The solution adopted was to look to the nature of the main proceeding, in the course of which equitable or legal claims had been interposed.

It was stated thus by Maxwell, C. J.: "The rule seems to be that where the action is at law, to review the action itself or a final order in any special proceeding therein the proper practice is by petition in error; but where the action is in equity, the decree itself or any special proceeding in the action * * * * * may be reviewed on appeal."[22]

In like manner in Massachusetts, where certain equitable defences may be made at law, an action at law in which such a defence is raised is reviewed by exceptions like any other action at law.[23]

The Question of Injunctions.—There remains the matter of injunctions to preserve the *status quo* pending actions at law. It is a needless expense to require a separate suit with new process and pleadings for this purpose. But no statute is necessary here. The Supreme Court has power by equity rules to prescribe the forms of procedure for exercise of all equitable powers of the court. Surely it may provide that this power of granting an injunction auxiliary to a pending legal proceeding, may be exercised upon petition and notice in the legal controversy itself. Indeed, it would seem arguable that it might by rule allow a plea or answer or replication in an action at law to serve the purpose of a bill and so, without legislation, provide for equitable defences and equitable replications.

ROSCOE POUND.

Cambridge, Mass.

(22) Morse v. Engle, 26 Nebr. 247.
(23) Page v. Higgins, 150 Mass. 27.

BENEFIT INSURANCE—ESTOPPEL.

JOHNSON v. MODERN BROTHERHOOD OF AMERICA.

Supreme Court of Minnesota, May 26, 1911.

131 N. W. 471.

The effect of an estoppel resulting from the receipt from a certificate holder of dues and assessments, while he was engaged in a prohibited employment with knowledge on the part of the society of such employment, is to continue the certificate in force, with the prohibition as to such employment eliminated or ineffective.

SIMPSON, J.: This is an appeal by the defendant from an order made by the trial court —after verdict for plaintiff—denying the defendant's alternative motion for judgment or a new trial. The case involves the right to recover on a certificate of membership in a fraternal beneficiary association. The defendant interposed the defense that at the time of the death of the insured his certificate was void, because he was then engaged in the employment of a switchman. The by-laws of the society provided that, if any member engages in the occupation of switchman, his benefit certificate shall become null and void, provided, however, that a member may be so employed without invalidating his benefit certificate if he shall, before entering such employment, file a written waiver of any liability of the society founded on death or injury from any cause traceable to such prohibited employment. While admitting the existence and validity of this by-law, the plaintiff claimed that the society was estopped from asserting such a forfeiture, because it had, with knowledge of such prohibited employment, accepted and retained dues and assessments paid by the insured while so employed. Payment of dues and assessments by the insured was conceded, but knowledge of the society as to the prohibited employment was denied. The issue of fact so raised was submitted to the jury. The insured was himself an officer in the local lodge of the society. Evidence was introduced, tending to show that other officers of the local lodge knew of such employment, and that such employment of the insured was so generally known among members of the society, and continued for such a length of time that knowledge on the part of the society of the prohibited employment must be inferred. By the verdict returned in favor of the plaintiff it was found that the society did receive and retain the assessments with knowledge that the insured was working as a switch-

man. Such finding is sustained by the evidence.

(1) The defendant, however, contends that if such fact was shown by the evidence, it established, not an estoppel against the defendant, preventing it from asserting that the policy was void because of the prohibited employment, but a waiver of the written notice by the insured, releasing the society from liability for death or injury traceable to the prohibited employment. The effect so claimed by defendant cannot be given such estoppel or waiver. In a former decision this court determined the law of this case adversely to this claim of the defendant. This case was brought to this court by a former appeal, taken by the plaintiff after a directed verdict against her. Johnson v. Modern Brotherhood of America, 109 Minn. 289, 123 N. W. 819, 27 L. R. A. (N. S.) 446.

The view here contended for by the defendant was adopted by the trial court on the former trial, and a verdict directed in accordance therewith against the plaintiff. In the former decision of this case, Justice O'Brien, speaking for the majority of the court, declared such view erroneous, and stated: "In holding that by the acceptance and retention of the assessments the defendant, if it waived anything, only waived the execution of the written agreement by the insured modifying the scope of the certificate, the court made a new contract between the parties without the consent of either. In the Abell Case the by-laws of the association definitely provided for this new contract, which would become effective without any further act than the entering into, by the insured, of a prohibited occupation. Here, when the insured entered upon the prohibited occupation, the certificate was void if the defendant chose to so treat it. Instead of doing so, it continued to receive and retain the assessments paid by the insured. * * * If the evidence in this case was convincing that the defendant had knowledge of the occupation in which the insured was engaged, or that he had been so engaged for such a length of time that it should be presumed to have knowledge, we would have no doubt of plaintiff's right to a directed verdict." By so holding, this court has settled, as the law of this case, the effect of the acceptance of assessments from the insured with knowledge of his prohibited employment under the certificate and by-laws here involved.

(2) There is no force in the contention of the defendant that under the statute of Iowa (Code, § 1822) a rule different from the usual one applies to the question of waiver or estoppel through disregard of a condition contained in a by-law of the society. The statute referred to provides that a society of the class to which the defendant society belongs shall make provision for payment of benefits in case of death or disability of members "subject to compliance by its members with its constitution and laws." Such a provision is inherent in the law governing the corporate obligations to members of all corporations having a constitution and by-laws. Its statement in this form in the statute referred to adds nothing to the general law governing corporate action. This by-law was not prescribed by the statute. The waiver of a forfeiture under it, and the resulting payment of a benefit, is not an ultra vires act of the society.

Defendant assigns as error the refusal of the court to charge the jury, as requested, "that unless you find from the evidence that the deceased, at the time of so paying his dues and assessments, understood and believed that by so doing he was keeping his policy in force, *and the same covered the hazards and risks incident to his occupation as a switchman*, then your verdict should be for the defendant." The italicized portion of the above request assumes that the effect of an estoppel through acceptance of assessments with notice to the society of the insured's prohibited employment was a question of fact for the jury. Under the evidence and law applicable to the case, as announced in the former decision, such estoppel, in effect, revived or continued in force the certificate in its original form, without a waiver of liability for risks incident to the occupation as switchman. The requested instruction was properly refused.

Under several assignments of error, questions are raised by appellant as to portions of the charge given by the court in submitting the case to the jury, and as to the refusal of the court to instruct the jury as requested. We are satisfied, from an examination of the record, that the issue clearly defined in the prior decision of the case was fairly submitted to the jury, and that the requested instructions were properly refused.

Order affirmed.

NOTE.—*Estoppel Against Fraternal Insurance Companies in Receipt of Dues from Members in Prohibited Occupation.*—It must be conceded that there is abundant authority for the ruling made by the principal case, but there are some cases which proceed upon such a directly opposing line and which seem to this annotator to be reasoned out strongly that he has thought it well to present the groundwork of their conclusions.

First, however, it is well to set out the facts of the principal case as they were shown in the decision on former appeal. S. C. 109 Minn. 289, 123 N. W. 819, 27 L. R. A. (N. S.) 446.

By that decision it appears that the member, whose benefit certificate was sued upon, became engaged in a hazardous occupation on September 20th, 1907, and was accidentally killed therein November 10th, 1007. A by-law provided that "his benefit certificate by such act shall become null and void; provided, however, that the member may, without invalidating his benefit certificate, be employed," etc., if he files "with the Supreme Secretary a written waiver of any liability of this society upon his benefit certificate so far as his death traceable to his employment."

The proof in the former case showed that the member was an officer of his local lodge and that the secretary of that lodge knew his occupation.

Under these circumstances the trial court directed a verdict for the defendant upon the authority of Abell v. M. W. A., 96 Minn. 494, 105 N. W. 65, but the court held the authority not controlling, a question unimportant here to consider, and reversed the trial court, saying: "If the evidence in this case was convincing that the defendant had knowledge of the occupation in which the insured was engaged or had been so engaged for such length of time that it should be presumed to have knowledge, we would have no doubt of plaintiff's right to have a directed verdict. But how far notice to officers and members of subordinate lodges is notice to the corporation is always perplexing, and here insured was one of those officers, so that his knowledge was not knowledge by the defendant."

This seems as drastic a ruling as we remember ever to have seen. It is not pretended that more than one man knew the member was engaged as he was, and even if every member of the local branch, or as far as that is concerned, every member of the order but the supreme secretary had known it, there is no presumption that they would know he had not filed with the supreme secretary the waiver required. His ostensible attitude as a member was in no whit alterable by filing the waiver, as his assessments, his duties, his membership were as before. The case extends to an extraordinary length all others on the same line.

Some of those cases are Modern Woodmen v. Wieland, 109 Ill. App. 340; Norton v. Catholic Order of Forresters, 138 Iowa 464, 114 N. W. 803, 24 L. R. A. (N. S.) 1030; Supreme Tent, K. M. v. Volkert, 25 Ind. App. 627, 57 N. E. 203; Modern Woodmen v. Colman, 68 Neb. 660, 94 N. W. 814; Kidder v. Knights Templars & M. L. Ind. Co., 04 Wis. 528, 76 N. W. 37.

All of these cases go upon the theory that there is an estoppel arising out of the receipt of dues and assessments with knowledge on the part of the association of the ground of forfeiture, and in about all, if not every one, of them, the only knowledge pretended to be shown is that of officers or members, or both, of local lodges, with nothing shown as to any duty on the part of anyone to report such ground of forfeiture to any chief officer. In other words, the local officers and individual members, by their accidental knowledge, with respect to which no duty is prescribed, are so far managers of a fraternal insurance association as to bind it, while the member violating its rules, which he must participate in seeing enforced as to others, may overlook them as to himself and his beneficiary and take advantage of his wrong in this regard.

In Showalter v. M. W. A., 156 Mich. 390, 120 N. W. 994, it was provided that engaging in prohibited employment worked a forfeiture and it was urged there was waiver of forfeiture "by accepting dues with the knowledge that the decedent was engaged in the prohibited employment, coupled with the fact that the dues were remitted to the general body and retained and not returned to the assured or his representatives."

The testimony to show this knowledge was that the clerk of the camp was told of decedent's employment when she went to pay his dues. It was said the local camp could not waive the provision because "the contract was by the great camp, and the waiver must be by the great camp. * * * No act of assured was induced by any non-action on the part of the great camp."

It was also said, that as the member still was insured except as death might happen from his employment, it might be assumed he was paying on that theory, even if it were known to the great camp.

This case admits that estoppel in some cases might arise as against a fraternal association receiving dues and assesments from a member, whose certificate could be taken as forfeited, and it is important only on the theory that notice to a local camp or knowledge of its members or officers is not notice to or knowledge by the association with which is the member's contract.

But a recent case decided by Connecticut Supreme Court of Errors, goes upon a very much broader theory, as looked at from one standpoint, and a narrow issue as looked at from another. See Grand Lodge A. O. U. W. v. Burns, 80 Atl. 157.

The position is a broad one, so far as generally respects insurance contracts of fraternal companies, and narrow with respect to the peculiar relation of each member to his association.

In that case the member engaged in a prohibited avocation, being so engaged several years prior to his death. The Recorder of his local lodge knew he was so engaged, but its financial officers who received and remitted the assessments did not, nor did the officers of the grand lodge.

It did not come within the recorder's duty to take any action upon such knowledge. The court says also: "But the general law by which an officer of a corporation in the transaction of official business may be treated as a principal does not apply with the same force to the officers of defendant corporation under its constitution and by-laws as it does to ordinary corporations."

The opinion then quotes from Coughlin v. Knights of Columbus, 79 Conn. 218, 64 Atl. 223, in speaking of waiver by acceptance of assessments, as follows: "But this rule does not apply with equal force to the officers of defendant corporation under its peculiar charter, constitution and laws. The peculiar and limited purposes of the corporation are executed through the agency as well of members as of officers. Officers and members are alike bound by the laws which prescribe and limit their duties and powers. * * * The officers of this defendant, in dealing with Coughlin and other insurance members, were all acting as special agents under a special authority, the precise limits of which were known to all members, and their acts alleged in the

reply were in excess of this authority and cannot operate to prevent the defendant, either by waiver or estoppel from maintaining its defense (of forfeiture)."

Coughlin's beneficiary relied upon a practice continued for a long time by which payment of assessments within a certain period was not observed, and while it was a practice of a local lodge, it seems to us, that the reasoning would apply to any act by general officers because their duties are as severely defined as those of local officers.

It is well known that, if one deals with a corporate agent, whose duties are special, outside of those duties, he has no claim against his principal unless, of course, the act is ratified.

But how can the general officer, known also by a member to have only special powers, ratify what is beyond his power to authorize?

Does the taking of money by one of these associations operate as ratification? It is not the association's money, because the association is not in business to make money, and it really owns no money. Its general officers merely constitute a clearing house for money coming through proper channels from their principals, and whosoever assumes to be a principal, when he has no standing as such is merely a volunteer at his own instigation, and cannot make his act the basis of a contractual right with a merely benevolent association, as to which he sustains a special relation. A principal cannot violate his own rules and say his agents waived the violation and thus alter the relationship of principals *inter sese*. C.

CORRESPONDENCE.

THE SCIENTIFIC STUDY OF THE LAW.

Editor Central Law Journal:

May I be presumptuous enough to offer you a suggestion? As far as I have been able to learn, there is not in this whole country a single periodical solely devoted to the scientific discussion of law, except perhaps some university publications, more or less in the nature of playgrounds for budding jurists. The practical portions of the journals are the most important, and all theoretical papers have to be cut short, as but a small space can be allowed to them.

A purely theoretical periodical would probably not pay; but in case of an old-established, very widely known and appreciated publication like your own, might it not be practical and possible to devote one issue each month to theoretical discussions, leaving the other three or four to deal with reports and discussions of cases, etc., with such editorial remarks as they might call for. Such an arrangement would give contributors a chance, not merely to make remarks about legal questions, but to take them up for a thorough discussion. In this way a beginning might be made towards the creation of a scientific jurisprudence, the lack of which is much felt, and which some people have thought could be supplied, if somebody would give a million or so for the purpose of creating an American corpus juris.

AXEL TEISEN.

Philadelphia, Pa.

[This suggestion, short and tersely put, is the best that has yet come to our attention as a proper beginning for an American corpus juris. Prof. Wigmore (— C. L. J. —) expressed nearly the same idea when he opposed the scheme proposed by Messrs. Andrews, Kirchwey and Alexander, by saying that there were not a sufficient number of scholars in America to produce such a work. We like the suggestion of Mr. Teisen, that a part of our space be used to encourage scientific legal research. And we are more than willing to assist in this direction by reason of the increasing number of active practitioners, who have evidenced an interest to study along such lines. Such interest is a reassuring symptom that the bar of this country is rising to a higher plane of thought. —Editor.]

BOOK REVIEWS.

BLACK ON INTERPRETATION OF LAWS. SECOND EDITION. HORNBROOK SERIES.

Mr. Henry Campbell Black, M. A., author of Black's Law Dictionary and of Treatises on Judgments, Tax Titles and other works well known to the profession, presents to the legal world a second edition of his work on Interpretation of Laws.

Professor Black holds deservedly high rank among law book writers and his new and enlarged edition on the above subject should be received with much favor.

The rules for the construction and interpretation of written laws are set forth in this work after the manner of a code and their explanation and development are shown in annotation.

Decisions in the fifteen years intervening between the first and second editions of this work have caused the author to greatly revise his original edition, to attain, in the view of the author, "a more logical and orderly system of classification."

This work has been considered among the standards, and now, as greatly as at any time heretofore, there is need for keeping before us sound rules of interpretation. We are drifting from accepted canons and it is hard to get our bearings. Mr. Black's book should help us to find them.

The method and thoroughness of treatment by Mr. Black is well known to the profession and in this book these are maintained.

The book is in a single volume, bound in law buckram and gotten up with the typographical excellence marking the work of its publisher, West Publishing Co., St. Paul, Minn. 1911.

HUMOR OF THE LAW.

"In one benighted region of a certain state in the Southwest," says a Chicago lawyer, "they cherish some peculiar notions touching the duties of a juror.

"One day a case was being tried, when suddenly the justice exclaimed:

"'How is this? There are only eleven jurymen in the box. Where is the twelfth?'

"The foreman rose and addressed the court respectfully as follows:

"'May it please your honor, the twelfth juror had to go away on important business, but he has left his verdict with me.'"—Picayune.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. **Attorney and Client**—Rights of Client.—Where an attorney abandons his client's litigation without notice, the client is entitled to a reasonable time before judgment can be taken against him.—ParksP v. Coyne, Mo., 137 S. W. 335.

2.——Fidelity to Client.—An attorney who has fraudulently attempted to overreach his clients is not entitled to reimbursement for taxes paid under the scheme to defraud.—Henyan v. Trevino, Tex., 137 S. W. 458.

3. **Bankrkuptcy**—Self-Crimination.—Requiring bankrupt to deposit his books of account with a receiver with the right to use and permit them to be used in the civil administration of a bankrupt's account, and not for any criminal proceeding, held not to compel the bankrupt to be a witness against himself in the constitutional sense.—In re Harris, 31 Sup. Ct. 557.

4.——Stay of Proceedings.—A special answer, alleging that plaintiff had been adjudged a bankrupt, but failing to allege that the claim sued on was one from which a discharge would be a release, or that a discharge had not been denied, held insufficient to authorize a stay of proceedings under Bankruptcy Act, sec. 11a.—State ex rel. Strother v. Broaddus, Mo., 137 S. W. 268.

5. **Banks and Banking**—National Banks.—The state is without authority to enact laws conflicting with the national banking act, or interfering with the business of national banks.—First Nat. Bank v. Commonwealth Ky., 127 S. W. 518.

6. **Bills and Notes**—Indorser.—Under Negotiable Instruments Act presentment of a negotiable note for payment held necessary to charge indorsers.—Williams v. Paintsville Nat. Bank, Ky., 137 S. W. 535.

7.——Indorser.—One not a mere indorser, but an original promisor, is not entitled to the strict rights of a mere indorser or surety.—Jones v. Lynch, Tex., 137 S. W. 395.

8.——Oral Acceptance.—A draft may be accepted orally.—Seguin Milling & Power Co. v. Guinn, Tex., 137 S. W. 456.

9. **Boundaries**—Estoppel.—An adjoining owner by consenting that his neighbor might erect a building over a boundary line was not thereby estopped to claim title to the true line.—Balt v. Butz, N. J., 79 Atl. 881.

10. **Carriers**—Care of Passenger.—A carrier receiving a passenger suffering from an infirmity or illness held required to exercise all care that a reasonably prudent person would to protect him.—Adams v. St. Louis Southwestern Ry. Co. of Texas, Tex., 137 S. W. 437.

11.——Contributory Negligence.—It is not contributory negligence as a matter of law for a passenger to ride on the running board of an open trolley car.—Edwards v. New Jersey & H. R. Ry. & Ferry Co., 129 N. Y. Supp. 717.

12.——Loss of Baggage.—To make a railroad company liable as a common carrier or warehouseman for baggage lost, it must have been delivered to and accepted by the carrier, either actually or constructively.—Williams v. Southern Ry. Co., N. C., 71 S. E. 346.

13.——Res Ipsa Loquitur.—The presumption of negligence, when a passenger is injured by the carrier's instrumentalities require defendant to prove injury without negligence on his part by showing an inevitable accident.—Walker v. Beaumont Land & Water Co., Cal., 115 Pac. 766.

14.——Res Ipsa Loquitur.—Proof of the derailment of a train and resulting injury to a passenger held prima facie proof of actionable negligence.—Parker v. Boston & M. R. R., Vt., 79 Atl. 865.

15.——Unreasonable Regulations.—Regardless of statute, carriers cannot maintain unreasonable regulations for receipt and transportation of freight.—Warner v. St. Louis & S. F. R. Co., Mo., 137 S. W. 275.

16. **Charities**—Cy Pres.—When the donor's scheme for administering a trust breaks down, it is the duty of the court under cy pres to devise one for that purpose as nearly like the donor's as possible.—Adams v. Page, N. H., 79 Atl. 837.

17. **Chattel Mortgages**—Notice.—A chattel mortgagee held not required to give notice of intent to take possession of mortgaged property for breach of condition.—Livermore Falls Trust & Banking Co. v. Richmond Mfg. Co., Mo., 79 Atl. 844.

18.——Removal of Property.—Under the rule of comity between states, a mortgagee has the better right, upon a removal of property to another state, against a levying or attaching creditor or an innocent purchaser from the mortgagor in such state, into which the property has been removed without his consent.—Newsum v. Hoffman, Tenn., 137 S. W. 490.

19. **Certiorari**—When Lies.—Where an exception to the legality of a citation is improperly overruled by a justice of the peace, and judgment given for plaintiff on the merits, which judgment is affirmed by the district court, certiorari is affirmed by the district court, certiorari lies to the Supreme Court.—Welch v. New Orleans Great Northern R. Co., La., 55 So. 338.

20. **Commerce**—Original Package.—The business of importing beer into the state and selling it therein in the original packages is interstate commerce, and cannot be taxed by the state.—State v. Pabst Brewing Co., La., 55 So. 349.

21. **Constitutional Law**—Construction.—Constitutional limitations are to be defined by words found written in the instrument, and not by reference to some spirit supposed to pervade it, or to overshadow its expressed provisions.—State v. De Lorenzo, N. J., 79 Atl. 839.

22.——Police Power.—The state under its police power has the right to regulate any and all kinds of business to protect the public health, morals, and welfare.—Selvage v. Talbott, Ind., 95 N. E. 114.

23.——Taxation.—Premiums due a foreign insurance company on open account, though charged to local agents, may be subjected to state taxation without constituting a taking of the company's property without due process of law.—Orient Ins. Co. v. Board of Assessors for Parish of Orleans, 31 Sup. Ct. 554.

24. **Corporations**—Action.—A creditor of a corporation, in the absence of statutory authority, cannot sue a stockholder to secure payment of his debt to the extent of the former's unpaid balance on the stock owned by him.—Manufacturers' Commercial Co. v. Heckscher, 129 N. Y. Supp. 556.

25. **Contracts**—Condition Precedent.—An offer to return the consideration of an instrument sought to be impeached for fraud, etc., is not a condition precedent to the institution of a suit.—Joslyn v. Empire State Degree of Honor, 129 N. Y. Supp. 563.

26.——Construction.—Every contract must be definite and certain as to the terms to be performed by either party, and, where the court cannot fix the exact legal liability of the parties, the contract is unenforceable.—Gaines v. Vandecar, Or., 115 Pac. 721.

27.——Duress.—A contract procured by duress is voidable and not void; and the injured party may either repudiate or affirm.—Bushnell v. Loomis, Mo., 137 S. W. 257.

28.——Elements of.—Where it is sought to establish a contract by letters passing between the parties, it must be shown that at some point there was a definite proposal by one party which was unconditionally accepted by the other.—Dougherty v. Briggs, Pa., 79 Atl. 924.

29.——Excuse for Non-Performance.—If one enters into a special contract with another, his mere liability to perform the contract will not relieve him from the default, unless he was prevented by the act of God or by the public enemy.—Williams v. Armour Car Lines, Del., 79 Atl. 919.

30.——Special Scrutiny.—Contracts of persons of weak understanding and contracts between persons in confidential relations will be closely scrutinized to discover whether undue influence was exerted.—Du Bose v. Kell, S. C., 71 S. E. 371.

31.——Voluntary Payment.—Payment of taxes voluntarily and without subsequent promise by another to repay them creates no obligation by parties claiming interests in the land to repay.—Parker v. Daly, Or., 115 Pac. 723.

32. **Courts**—Jurisdiction.—The presence of one of the defendants in the federal district in which suit by the United States under Anti-Trust Act is brought to restrain violations of that act, gives the Circuit Court jurisdiction.—Standard Oil Co. of New Jersey v. United States, 31 Sup. Ct. 502.

33. **Criminal Law**—Evidence.—The rule that evidence of one illegal sale of intoxicating liquors should not be received as evidence that another such sale had been made held not to apply when the evidence tends to show that defendant kept liquor on hand for the purpose of illegal sale.—State v. Boynton, N. C., 71 S. E. 341.

34.——Judicial Cognizance.—The Supreme Court takes judicial notice that the population of a city is as shown by the federal census.—State v. Gross, Ind., 95 N. E. 117.

35. **Damages**—Exemplary Damages.—Exemplary damages may be allowed for torts committed with fraud, malice, or deliberate violence.—Farrow v. Hoffecker, Del., 79 Atl. 920.

36.——Mental Suffering.—In an action for personal injuries, mental suffering, caused by the plaintiff's incapacity to earn a living, may be considered in measuring the damages.—Citizens' Ry. Co. v. Branham, Tex., 137 S. W. 403.

37. **Death**—Parties.—An action for negligent death must be prosecuted in the name of all the beneficiaries or in the name of one or more for the benefit of all.—Vernon Cotton Oil Co. v. Catron, Tex., 137 S. W. 404.

38. **Deeds**—Inconsistent Clauses.—Where a deed contains a general description conforming to the intent of the parties, and another inconsistent description, the latter description must be rejected.—Mylius v. Raine-Andrew Lumber Co., W. Va., 71 S. E. 404.

39.——Restrictions.—Restriction in a deed against the erection of any building used as a "stable" held not to be violated by use as a garage.—Riverbank Improvement Co. v. Bancroft, Mass., 95 N. E. 216.

40.——Undue Influence.—Where a deed was procured by undue influence exerted on the grantor, equity will set it aside on a proper and timely application by the person aggrieved.—Du Bose v. Kell, S. C., 71 S. E. 371.

41. **Divorce**—Appeal and Error.—Where defendant failed to comply with an order requiring payment for support of plaintiff pending his appeal, held, that the part of the decree relating to the permanent maintenance of the wife and children will not be reviewed.—Tuttle v. Tuttle, N. D., 131 N. W. 460.

42.——Condonation.—Condonation rests always upon the condition that the misconduct or injury will not be repeated.—Skinner v. Skinner, Ind., 95 N. E. 128.

43.——Personal Violence. — Where personal violence is exercised by a husband against a wife, the burden is on him to prove a lawful excuse.—Bernard v. Lay, La., 55 So. 336.

44. **Easements**—Merger.—One cannot have an easement upon his own property.—Broom v. Grizzard, Ga., 71 S. E. 430.

45. **Ejectment**—Common Grantor. — Where plaintiff in trespass to try title shows that her claim of title and that of defendant is from a common source, she will not be permitted to attack the title of such common source.—Skov v. Coffin, Tex., 137 S. W. 450.

46. **Evidence**—Incompetency.—The introduction of evidence that could have been excluded on objection held not necessarily to open the door to the adverse party to introduce incompetent evidence.—Parker v. Boston & M. R. R., Vt., 79 Atl. 865.

47.——Judicial Cognizance.—Courts take judicial notice of whatever ought to be generally known within their jurisdiction, including the common methods by which business is transacted.—Wallace v. Coons, Ind., 95 N. E. 132.

48.——Judicial Cognizance.—Courts take notice that during warm weather in Missouri it is light enough to drive stock about 4 o'clock a. m.—Warner v. St. Louis & S. F. R. Co., Mo., 137 S. W. 275.

49.——Judicial Notice.—The fact that spruce trees are neither poisonous or noxious is not so universally known that the court will take judicial notice of it.—Ackerman v. Ellis, N. J., 79 Atl. 883.

50.——Presumption.—Where it appeared that plaintiff in an action to recover for services rendered under compulsion was at work in a chain gang under sentence for a misdemeanor, it will be presumed that the public officers did their duty, and that plaintiff was being worked in accordance with law.—Hamby v. Collier, Ga., 71 S. E. 431.

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59.——Original Promise.—An oral contract with a physician to treat the wife of a third person held valid, if intended as a primary contract.—May v. Roberts, Okl., 115 Pac., 771.

60.——Pleading.—In an action on a contract, where the plea of non assumpsit requires plaintiff to prove a contract enforceable at law, defendant has the benefit of the statute of frauds, without specially pleading it.—Owen v. Riddle, N. J., 79 Atl. 886.

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